

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

## RICHARD FRANKLIN,

Plaintiff,

CASE NO. C10-5183BHS

V.

GOVERNMENT EMPLOYEES  
INSURANCE COMPANY, a Maryland  
Corporation; and GEICO GENERAL  
INSURANCE COMPANY, a Maryland  
Corporation,

**ORDER DENYING MOTION  
FOR CLASS CERTIFICATION**

## Defendants.

This matter comes before the Court on Plaintiff Richard Franklin’s (“Franklin”) motion to certify class (Dkt. 36), Defendants Government Employees Insurance Company (“GEICO”) and GEICO General Insurance Company’s (“GEICO General”) (collectively “Defendants”) motion to exclude the expert reports of Nayak L. Polissar, Ph.D. (Dkt. 47), Defendants’ motion to exclude the expert reports of Kristin L. Wood, Ph.D. (Dkt. 49), and Defendants’ motion for leave to file a surreply (Dkt. 71). The Court has reviewed the briefs filed in support of and in opposition to the motions and the remainder of the file and hereby denies the motion for class certification the reasons stated herein.

## I. PROCEDURAL HISTORY

On March 17, 2010, Franklin filed a complaint against Defendants on behalf of himself and as the proposed representative of a class. Dkt. 1. Franklin alleges that GEICO General breached its contract of automobile insurance with Franklin and that the

1 Defendants breached similar contracts with members of the proposed class. *Id.*  
2 Franklin's causes of action are based on the theory that an automobile suffers diminished  
3 value ("DV") after the automobile has been damaged in a collision. *Id.* ¶¶ 4.1-4.4. The  
4 specific allegations regarding Defendants' breaches of the contracts are as follows: (1)  
5 Defendants breached the express provisions of their contracts "by failing to disclose the  
6 right to recover diminished value, by failing to assess [the insureds'] diminished loss, and  
7 by not compensating them for [the insureds'] diminished value loss;" and (2) Defendants  
8 "breached the express provisions of its contracts with certain members of the Class by  
9 paying their [uninsured or underinsured motorist property damage ("UMPD")] or  
10 hit-and-run claims under its collision or comprehensive coverage" ("mischaracterization  
11 claim"). *Id.* ¶¶ 7.6 & 7.7. Franklin seeks specific performance or damages, declaratory  
12 and injunctive relief. *Id.*

14 On June 3, 2010, Defendants filed a motion to dismiss, arguing, in part, that  
15 Franklin lacked standing to bring his mischaracterization claim. Dkt. 17. On July 28,  
16 2010, the Court granted in part and denied in part Defendants' motion and dismissed  
17 Franklin's stand-alone mischaracterization claim. *See* Dkt. 28 at 4-6. Thus, Franklin's  
18 remaining claims are dependant upon Defendants' failure to investigate, assess, and  
19 compensate the insureds for the DV of their automobiles.

20 On May 5, 2011, Franklin filed a motion for class certification. Dkt. 36. In  
21 support of his motion, Franklin submitted two expert reports by Nayak L. Polissar, Ph.D.  
22 ("Polissar") (*Id.* Exhs. 33 & 34), and two expert reports by Kristin L. Wood, Ph.D.  
23 ("Wood") (*Id.* Exhs. 10 & 11). On June 10, 2011, Defendants responded (Dkt. 38) to the  
24 motion for class certification, filed a motion to exclude Polissar's reports (Dkt. 47), and  
25 filed a motion to exclude Wood's reports (Dkt. 49). On July 5, 2011, Franklin responded  
26 to the motions to exclude. Dkts. 63 & 64. On July 8, 2011, Franklin replied to his motion  
27  
28

1 to certify the class (Dkt. 70) and Defendants replied to their motions to exclude (Dkts. 66  
2 & 69).

3 On July 26, 2011, Defendants filed a motion for leave to file a surreply to  
4 Franklin's reply for class certification. Dkt. 71. On July 28, 2011, Franklin responded.  
5 Dkt. 72.

## 6 II. FACTUAL BACKGROUND

### 7 A. Franklin's Individual Claims

8 On July 3, 2008, GEICO General issued an automobile insurance policy to  
9 Franklin. Dkt. 17-2 at 4-33 ("Policy"). The Policy included UMPD coverage (*id.* § IV),  
10 and GEICO General agreed to pay Franklin for property damage that he was legally  
11 entitled to recover (*id.*, LOSSES WE WILL PAY, ¶ 2). The Policy defined "property  
12 damage" as "damage to or destruction of property." *Id.*, DEFINITIONS, ¶ 6.  
13

14 On November 1, 2008, Franklin was involved in an automobile accident with an  
15 uninsured motorist in Pierce County, Washington. Dkt. 37, Declaration Stephen M.  
16 Hansen ("Hansen Decl."), Exh. 28, Declaration of Richard Franklin, ¶ 2. It is undisputed  
17 that Franklin's vehicle was damaged and that the estimate to repair the damage was  
18 approximately \$5,098. Dkt. 1, ¶ 4.1; Dkt. 15, ¶ 4.1. It is also undisputed that GEICO  
19 General elected to repair the vehicle and paid Franklin approximately \$4,998 (the  
20 estimate minus the deductible). *Id.*

21 Defendants assert that Franklin's vehicle may have suffered additional damage  
22 after the accident but before the original estimate. During the deposition of Franklin's  
23 wife, Debra, defense counsel questioned her about tweets that she had posted on her  
24 Twitter account. Dkt. 40-7, Deposition of Debra Franklin at 37-42. On November 3,  
25 2008, two days after the accident, Debra tweeted that Franklin had "slammed" the car into  
26 rockery. *Id.* at 38. At the deposition, Debra confirmed that Franklin had "pushed – or  
27 backed into the rockery in the back of [their] house." *Id.*

1       On December 10, 2009, Darrell Harber prepared a “Vehicle Evaluation Report” of  
 2 Franklin’s vehicle. Dkt. 40-4 (“Harber Report”). The report listed the date of loss as  
 3 November 1, 2008, and concluded that the total cost of repairs would be \$6,043.43. *Id.* at  
 4 1. This cost was based on the original November 23, 2008 estimate and an estimate for  
 5 “additional repairs” dated December 3, 2009. *Id.* at 7-11. With regard to DV, the Harbor  
 6 Report estimated the pre-loss value of Franklin’s vehicle “to be \$11,993.75 to  
 7 \$13,256.25.” *Id.* at 4. The report provides an assessment of the post-loss value as  
 8 follows:

9       After addressing the \$6,043.03 in total repairs, the type and location of  
 10 these repairs and the overall affect they have on the vehicle, it is my  
 11 professional opinion that this vehicle has a loss in value, due to the  
 12 accident. I have determined the Post Accident Value of the above  
 13 referenced vehicle to be \$8,838 which assumes all remaining damage, if  
 14 any, has been repaired and the vehicle has been returned to pre-loss  
 15 condition as close as humanly possible. It is my professional opinion that as  
 16 a result of the collision on November 1, 2008 the subject vehicle suffered  
 17 diminution of **the actual cash value of the vehicle** in the amount of \$3,788.

18       *Id.* (emphasis added).

19       On December 10, 2009, Franklin sent GEICO General a letter requesting  
 20 reimbursement for the vehicles’ DV. Dkt. 40-8. Franklin alleges that, after months of  
 21 dealing with GEICO General, the insurance company offered to compensate Franklin for  
 22 his vehicle’s DV. Dkt. 1, ¶ 4.4; *see also* Dkt. 40-8. Franklin refused the offer because he  
 23 claims it was insufficient. *Id.*

24       **B. Class Claims**

25       Defendants sell UMPD coverage in 26 states, including Washington.<sup>1</sup> In every  
 26 state, the insurance policy language provides that Defendants would pay for damages that  
 27 “the insured is legally entitled to recover . . . .” Dkt. 36, Exh. A (“Uniform Policy

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28       <sup>1</sup> The other 25 states are Alaska, Arkansas, California, Colorado, District of Columbia,  
 29 Delaware, Georgia, Illinois, Indiana, Louisiana, Maryland, Mississippi, North Carolina, New  
 30 Jersey, New Mexico, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah,  
 31 Virginia, Vermont, and West Virginia.

1 Language Chart"). Franklin contends that this language requires Defendants to  
2 compensate insureds not only for the cost of repairing their vehicles but also for DV loss  
3 "stemming from irreparable and continuing physical damage to the vehicles." Dkt. 36 at  
4 9.

5 Franklin alleges that Defendants apply a "don't ask, don't tell" policy to DV  
6 losses. *Id.* at 16. Based on the DV procedures, Defendants' adjusters are instructed to  
7 inform DV claimants as follows: "The estimate and repairs completed are meant to bring  
8 the vehicle back to its pre loss condition. Once it is brought to pre loss condition, there is  
9 no diminished value." Dkt. 37-2 at 127. Defendants' Vice President of Auto Damage,  
10 William DeGrocco, testified that Defendants do not train or instruct their adjusters to  
11 disclose or pay a DV claim. Hansen Decl., Exh. 2, Deposition of William DeGrocco at  
12 127. Mr. DeGrocco also confirmed that Defendants do not recognize a DV loss and will  
13 pay an insured's DV claim "just to resolve the claim." *Id.*

### 15 III. DISCUSSION

#### 16 A. Surreply

17 Defendants request leave to file a surreply so that they may respond to the exhibits  
18 that Franklin attached to his reply brief. Dkt. 71. Although the Court agrees with  
19 Defendants that submitting new evidence in support of a reply brief is improper, the  
20 Court finds that there is no need for further briefing on the issues of class certification.  
21 The Court has considered Franklin's exhibits and finds that Defendants are not prejudiced  
22 by not having an opportunity to respond. Therefore, the Court denies Defendants' motion  
23 for leave to file a surreply.

1           **B. Motions to Exclude**

2           The Court must begin its analysis of the expert reports by explaining the issue for  
 3 which the reports have been submitted: the DV of damaged vehicles. Washington courts  
 4 recognize a difference between diminished value and stigma damages:

5           A vehicle suffers diminished value when it sustains physical damage in an  
 6 accident, but due to the nature of the damage, it cannot be fully restored to  
 7 its **pre-loss condition**. The remaining, irreparable physical damage, such  
 8 as, for example, weakened metal which cannot be repaired and which  
 9 results in diminished value. In contrast, stigma damages occur after the  
 10 vehicle has been fully restored to its **pre-loss condition**, but it carries an  
 11 intangible taint due to its having been involved in an accident.

12           *Moeller v. Farmers Ins. Co. of Washington*, 155 Wn. App. 133, 142, *review granted by*  
 13 169 Wn.2d 1001 (2010) (emphasis added). Moreover, restoring a vehicle to

14 pre-loss condition requires that an insured be compensated for all physical  
 15 damage incurred, to include, for example, unrepaired dents, bends or stress  
 16 to the vehicle's structure, and damage to the function or appearance of the  
 17 vehicle.

18           *Degenhart v. AIU Holdings, Inc.*, 2010 WL 4852200, \*5 (W.D. Wash. 2010). “In short,  
 19 residual physical damage is covered . . . . Stigma damage is not.” *Id.*

20           On the contrary, the rule in Georgia is that an insured must compensate an insured  
 21 for both diminished value and stigma damages. *See State Farm Mut. Auto. Ins. Co. v.*  
 22 *Mabry*, 274 Ga. 498 (2001). The Georgia Supreme Court has reasoned as follows:

23           the fact of physical damage resulting from an event covered by [an  
 24 automobile insurance policy] can reduce the value of a vehicle, even if  
 25 repairs return it to pre-loss condition in terms of appearance and function;  
 26 the policies issued by [the insurer] obligate it to compensate its  
 27 policyholders for that loss of value, notwithstanding repairs that return the  
 28 vehicle to pre-loss condition in terms of appearance and function, if the  
 29 repairs do not return the vehicle to its pre-loss value; and [the insurer] is  
 30 obligated to assess that element of loss along with the elements of physical  
 31 damage when a policyholder makes a general claim of loss.

32           *Id.* at 509. In other words, the insured’s loss “is the difference between the value of the  
 33 vehicle prior to the loss and its value after the loss.” *Id.* at 502.

1       In this case, Defendants move to exclude the expert opinions of Polissar and  
2 Wood. Dkts. 47 & 49. Defendants argue that Polissar's reports fail to meet the standards  
3 set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and Fed. R. Evid.  
4 702 (Dkt. 47 at 3) and that Wood's reports fail to meet the standards of *Daubert*, Fed. R.  
5 Evid. 702, or Fed. R. Evid. 703 (Dkt. 49 at 4).

6       **1. Standards**

7       If expert testimony will "assist the trier of fact to understand the evidence or to  
8 determine a fact in issue," such testimony is admissible so long as:

9                   (1) the testimony is based upon sufficient facts or data, (2) the testimony is  
10 the product of reliable principles and methods, and (3) the witness has  
11 applied the principles and methods reliably to the facts of the case.

12       Fed. R. Evid. 702. The trial judge must perform a gatekeeping function to ensure that the  
13 expert's proffered testimony is both reliable and relevant. *See United States v. Freeman*,  
14 498 F.3d 893, 901 (9th Cir. 2007). The gatekeeping function requires that the judge  
15 assess whether "the reasoning or methodology underlying the testimony is scientifically  
16 valid," and "whether that reasoning or methodology properly can be applied to the facts  
17 in issue." *Daubert*, 509 U.S. at 592–93.

18       **2. Polissar's Reports**

19       While it is doubtful that Polissar's opinions would pass scrutiny under the  
20 standards set forth above<sup>2</sup>, the opinions also are flawed in that they have no bearing on the  
21 elements of Franklin's cause of action under Washington law. *See Wal-Mart Stores, Inc.*  
22 *v. Dukes*, 131 S. Ct. 2541, 2554 (2011) (if an expert's testimony does nothing to advance  
23 the party's case, the court "can safely disregard what he has to say.").

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26                   <sup>2</sup> *See Fosmire v. Progressive Max Insurance Company*, No. 3:10-cv-05291-JLR, slip op.  
27 at 7-12 (W.D. Wash Oct. 11, 2011) (excluding similar reports by Polissar for similar causes of  
28 action).

1       In this case, Polissar states that he and his team “will use multiple regression  
 2 analysis to estimate the effect of properly repaired damage on the sale price of  
 3 automobiles.” Dkt. 37-4 at 51, ¶ 15. Polissar’s other report goes into great detail on how  
 4 multi-variable, statistical analysis will “determine the impact of accident damage  
 5 (followed by proper repair) on the sale price of a vehicle.” *See* 37-4 at 60. But Franklin  
 6 is entitled, under Washington law, only to damages related to residual physical harm such  
 7 as weakened metal, unrepaired dents, bends or stress to the vehicle’s structure, and  
 8 damage to the function or appearance of the vehicle. He is not entitled to stigma  
 9 damages, which is what Polissar’s reduced price “estimate” purportedly relates to.  
 10 Therefore, the Court grants Defendants’ motion and Polissar’s reports will be excluded  
 11 from consideration of class certification.

12       **3.       Wood’s Reports**

13       Although Wood’s reports are relevant to Franklin’s cause of action, the reports are  
 14 mostly, if not completely, irrelevant to the issues of class certification. Wood provides  
 15 opinions on the existence and extent of irreparable physical damage to a vehicle that has  
 16 been involved in an accident. Washington courts, however, already recognize that such  
 17 damages exist. *See Moeller*, 155 Wn. App. at 142. With regard to the extent of such  
 18 damages, this is an issue for trial<sup>3</sup> and provides little, if any, support for the issues of class  
 19 certification.

20       While Wood’s opinions have limited value regarding the present issues before the  
 21 Court, the Court is not persuaded that it must perform a gatekeeper function on these  
 22 opinions at this point of the proceeding. Moreover, the reports seem to support  
 23 Defendants’ position that irreparable physical damage must be determined on an

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 26       <sup>3</sup> To highlight the anticipated battle of expert opinions on the issue of irreparable physical  
 27 damage, Wood provides that “part loosening and secondary damage cannot be reasonably  
 28 anticipated or predicted [and] . . . cannot be visually diagnosed or tested with any existing  
 standard practice.” Dkt. 37-1 at 185-186, ¶ 21.

1 individual basis after each particular accident. Therefore, the Court denies Defendants'  
 2 motion without prejudice.

3 **C. Motion to Certify**

4 The class action is “an exception to the usual rule that litigation is conducted by  
 5 and on behalf of the individual named parties only.” *Califano v. Yamasaki*, 442 U.S. 682,  
 6 700–701 (1979). In order to justify a departure from that rule, “a class representative  
 7 must be part of the class and ‘possess the same interest and suffer the same injury’ as the  
 8 class members.” *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403  
 9 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216  
 10 (1974)).

11 The court may certify a class only if: (1) the class is so numerous that joinder of all  
 12 members is impracticable (“numerosity”); (2) there are questions of law or fact common  
 13 to the class (“commonality”); (3) the claims or defenses of the representative parties are  
 14 typical of the claims or defenses of the class (“typicality”); and (4) the representative  
 15 parties will fairly and adequately protect the interests of the class (“adequacy”). Fed. R.  
 16 Civ. P. 23(a); *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010). Even if  
 17 these criteria are met, the court has discretion over whether to certify a class. *Yokoyama v.*  
 18 *Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1090 (9th Cir. 2010).

20 An action may be maintained as a class action if the court finds that: (1) common  
 21 questions of law and fact predominate over questions affecting individual members  
 22 (“predominance”), and (2) a class action is superior to other available methods for the fair  
 23 and efficient adjudication of the controversy (“superiority”). Fed. R. Civ. P. 23(b)(3).

24 The Court will first consider Franklin’s proposed multi-state class and then  
 25 consider Franklin’s Washington-only class. The Court will finally consider Franklin’s  
 26 request to certify a class for injunctive or declaratory relief.

1        **1. Multi-State Class**

2        In *Hovenkotter v. SAFECO Ins. Co. of Illinois*, 2010 WL 3984828, (W.D. Wash.  
 3 2010), the plaintiff moved the Court to certify a 28-state class based on almost identical<sup>4</sup>  
 4 UMPD theories of liability. *Id.* at \*1-\*2. Judge Robart declined to certify the multi-state  
 5 class for numerous reasons. *Id.* at \*7-\*8. The relevant portion of the order provides as  
 6 follows:

7        The court declines to certify this breach of contract class action  
 8 because Mr. Hovenkotter fails to meet the threshold criteria of commonality.  
 9 First, there are 28 states at issue in this putative class which raises conflicts  
 10 of law and due process problems. Second, there are a number of Safeco  
 11 policies at issue. Even limiting the policies to the terms identified by Mr.  
 12 Hovenkotter, the court's review of the 268-page "Policy Language Excerpts"  
 13 provided by Safeco evidences the many differences, however slight, that  
 14 exist among the various policies. Mr. Hovenkotter attempts to reduce the  
 15 more than 200 policies down to a common sentence—"we will pay damages  
 16 which you are legally entitled to recover"—to show that there is no significant  
 17 difference in the policies. Even accepting this limitation, however, Mr.  
 18 Hovenkotter's argument is fraught with problems: (1) every policy is  
 19 governed by a different state's breach of contract law, the application of  
 20 which depends on that state's conflicts of law requirements; (2) to some  
 21 extent, each state differs in its breach of contract jurisprudence including  
 22 applicable statutes of limitations, forms of recovery, and available contract  
 23 defenses; and (3) to understand whether Safeco breached its policies by  
 24 failing to "pay damages which [its insureds] are legally entitled to recover,"  
 25 this court would need to look to each state's tort law to determine how  
 damages are measured after an accident.

Finally, certifying this class would require this court, sitting in Washington state with no personal jurisdiction over a plaintiff in, for example, Alaska, other than that he failed to opt-out of this class action, to apply Alaska contract and tort law to his claim on a class-wide basis. Moreover, according to Safeco, only one of the 28 states has addressed and affirmatively ruled on the availability of diminution value: Georgia. *See State Farm Mutl. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 556 S.E.2d 114 (Ga. 2001). Yet, Mr. Hovenkotter asks this court to make a determination as to the availability of diminution value as to the remaining 27 states.

Mr. Hovenkotter seeks to circumvent these problems by combining the 28 states' tort laws to show that they all require that Safeco pay diminution value. This is not supported by the case law. Mr. Hovenkotter cites cases from each jurisdiction with various rulings on what constitutes the appropriate measure of damages. These rulings cover a wide swath of

<sup>4</sup> The *Hovenkotter* motion and the instant motion are so similar that they contain identical spelling errors. Compare, e.g., *Hovenkotter*, Case No. 09-0218, Dkt. 44 § III.C.3 with Dkt. 36 § III.C.3 ("Plaintiff's claims be typical of the *claims* or defenses of the Class.") (emphasis added).

1 legal terrain. According to Mr. Hovenkotter's chart, some state courts hold  
 2 that a plaintiff is legally entitled to recover "diminution in value;" others  
 3 limit recovery to "loss in value" or "depreciation;" and still others limit  
 4 recovery to "the difference between the value of the chattel before the harm  
 5 and the value after the harm," "full compensation for the injury sustained,"  
 6 or "reduction in market value." Thus, contrary to Mr. Hovenkotter's  
 7 assertion, the amount of tort damages available to plaintiffs is not consistent  
 8 among the 28 states and therefore defeats the notion that the putative class  
 9 has common legal issues. For example, a plaintiff in Idaho may be entitled to  
 "diminution in value" while a plaintiff in South Dakota is entitled to "full  
 compensation for the injury sustained." As stated above, this court declines  
 to entertain the question of whether a South Dakota court would consider  
 diminution value as compensable if the vehicle is fully repaired. *See Phillips*  
*Petro. Co. v. Shutts*, 472 U.S. 797, 818, 105 S.Ct. 2965, 86 L.Ed.2d 628  
 (1985) (applying law of state without significant contacts is "fundamentally  
 unfair"). The court therefore declines to certify a class action in this case.

10 *Hovenkotter*, 2010 WL 3984828 at \*7-\*8.

11 In this case, Franklin fails to sufficiently address the problems that Judge Robart  
 12 identified. First, Defendants have issued over 132 policies in the 26 relevant states during  
 13 the relevant time period. Dkt. 38, Exh. 29. The policies issued in 17 of the states contain  
 14 choice of law provisions that require those contracts to be interpreted pursuant to the laws  
 15 of the specific state. *Id.* Thus, the determination of a class member's cause of action  
 16 requires consideration of each state's breach of contract law, including applicable statutes  
 17 of limitations, forms of recovery, and available contract defenses. *See* Dkt. 38, Exh. 20.  
 18 Although Franklin has submitted charts attempting to minimize conflicts and categorize  
 19 similar laws (*see* Dkt. 36, Exhs. A-F), the charts only reinforce the complications and  
 20 difficulties in determining the bounds of each policy in each state. In other words, the  
 21 numerous possibilities show that commonality has not been met.

22 With regard to damages, the issues are clearly not "common" between the class  
 23 states. In fact, the issue of DV damages may be an issue of first impression in some  
 24 states. For example, the Court would be required to interpret the statutes of Ohio and  
 25 Maryland, which Franklin proposes could be solved by redefining the class based on time  
 26 periods to preclude certain class members. *See* Dkt. 70, Exh. A. The mere fact that there  
 27

1 are so many inconsistencies between the class states belies the notion that there are  
2 common legal issues among the class.

3 Therefore, the Court finds that Franklin has failed to meet his burden on the  
4 element of commonality for the multi-state class, and the Court declines to certify the  
5 multi-state class. Franklin argues that if the Court declines to certify this class, the Court  
6 should certify a smaller class of “less than all 26 States.” Dkt. 70 at 14. It is, however,  
7 Franklin’s burden to present adequate classes for the Court to certify, and the Court will  
8 not *sua sponte* divide and certify Franklin’s proposed classes without allowing the parties  
9 proper notice and opportunity to be heard.

10 **2. Washington Class**

11 Franklin requests that, if the Court declines to certify the multi-state class, the  
12 Court should certify a Washington-only class. Dkt. 36 at 26. Although this class avoids  
13 the legal inconsistencies between the laws of several states, Franklin fails to show that  
14 this class meets the requirements of commonality, predominance and superiority.

15 With regard to commonality, Franklin has failed to show that liability or damages  
16 are common among the class. First, it is unclear whether GEICO General’s alleged  
17 “don’t ask, don’t tell” policy alone establishes a breach of contract claim under  
18 Washington law. In fact, Defendants have submitted evidence that the Washington  
19 Office of Insurance and at least one Washington trial court require the claimant to prove a  
20 DV claim. *See* Dkt. 38, Exhs. 4(B) & 27. In Franklin’s case, once Franklin asserted a  
21 claim for DV damages, GEICO General investigated and took the position the vehicle had  
22 been returned to its “pre-loss condition.” Dkt. 40-8. Thus, Franklin has failed to  
23 establish that Defendants’ actions present a common question of breach of contract,  
24 especially if the burden rests on an insured to prove a vehicle suffered irreparable  
25 damage.

1       Second, even if the “don’t ask, don’t tell policy” establishes a common violation,  
2 the individual nature of the damages at issue preclude a finding of commonality,  
3 predominance, or superiority. The facts of Franklin’s claim exemplify the individual  
4 nature of DV claims. There exists an individual factual question of whether all of the  
5 alleged damage occurred during the initial accident, as in the case of Franklin, or whether  
6 he incurred more damage when he backed the vehicle into the rockery at his house.  
7 There also exists an individual factual question as to the cost of restoring the vehicle to its  
8 pre-loss condition (in Franklin’s case, the original estimate was \$5098.46; the Harber  
9 Report estimated an additional \$944.57). For example, the Harber Report noted that a  
10 “complete disassembly” would be required to “determine the full extent of the remaining  
11 damage . . . .” Harber Report at 3. Franklin has failed to establish that these questions of  
12 fact are common among the class.  
13

14       Furthermore, each class member has presumptively made a claim on a unique  
15 vehicle that had been involved in a unique accident. Even if the occurrence of irreparable  
16 physical damage was a common question among the class, this issue does not  
17 predominate over the individual extent of each class member’s damage. Franklin has  
18 also failed to persuade the Court that a class action is the superior method for fairly and  
19 effectively adjudicating the controversy. At this point, it appears that the proposed class  
20 requires a fact finder to determine liability as to each class member’s claim, as well as the  
21 extent of irreparable damages. Accordingly, a class action is not the superior method to  
22 handle a trial on the merits for each class member. Therefore, the Court declines to  
23 certify Franklin’s proposed Washington class.  
24

### **3.       Injunctive or Declaratory Relief Class**

25       Rule 23(b)(2) provides that a class action may be maintained if the party opposing  
26 the class has acted or refused to act on grounds that apply generally to the class, so that  
27 final injunctive relief or corresponding declaratory relief is appropriate respecting the  
28

1 class as a whole. Fed. R. Civ. P. 23(b)(2). A class of this type, however, is inappropriate  
2 with respect to claims for monetary relief that are not “incidental” to the requested relief.  
3 *Dukes*, 131 S. Ct. at 2650-61.

4 In this case, Franklin has failed to show that his claim or any class member’s claim  
5 for monetary relief is incidental to the requested injunctive or declaratory relief. Even if  
6 Franklin proved that Defendants refused to act on a ground generally applicable to the  
7 proposed class, the individualized issues of damages are central to each class member’s  
8 DV claim. As the Supreme Court set forth in *Dukes*, this type of action is inappropriate  
9 for a Rule 23(b)(2) class. Therefore, the Court denies Franklin’s request to certify a Rule  
10 23(b)(2) injunctive or declaratory relief class.

#### 11 IV. ORDER

12 Therefore, it is hereby **ORDERED** that Franklin’s motion to certify class (Dkt. 36)  
13 is **DENIED**, Defendants’ motion to exclude the expert reports of Polissar (Dkt. 47) is  
14 **GRANTED**, Defendants’ motion to exclude the expert reports of Wood (Dkt. 49) is  
15 **DENIED**, and Defendants’ motion for leave to file a surreply (Dkt. 71) is **DENIED**.

16  
17 DATED this 31st day of October, 2011.

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BENJAMIN H. SETTLE  
United States District Judge